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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Circuit Court of Appeals is reported at 157 F. (2d) 616.

Jurisdiction

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The petition was filed December 17, 1946,

and was granted January 20, 1947, the case being transferred to the summary docket (R. 26). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

Question Presented

Whether a defendant may be given consecutive sentences upon an indictment under Section 150 of the Criminal Code (18 U. S. C. 264) which charged, in the first count, that he caused a plate adapted for counterfeiting Government obligations to be made on or about August 5, 1934, and, in the second count, that he possessed the same plate on or about that date and thereafter with intent to use it in counterfeiting such obligations.

Statute and Constitutional Provision Involved

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing,

or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custod , or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall

be fined not more than $5,000, or imprisoned not more than fifteen years, or both. (Italics added.)

The Fifth Amendment provides:

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

Statement

The Government's statement of the case is full, fair and accurate, and the following brief statement of the facts is made only for convenience.

The respondent was indicted in the United States District Court of Minnesota in 1935, for causing and procuring the unlawful manufacture of a counterfeit plate [1] and for possessing the same plate on the same day, with intent that the plate be used for counterfeiting (R. 1, 2).[2] The respondent, without benefit of counsel (*Michener* v. *Johnston*, 141 F. (2d) 171 (C. C. A. 9)), pleaded guilty to both

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[1] In the Government's brief in support of its Petition for Certiorari the point was made that respondent as one who procured and caused the manufacture was not a maker and was in a different and worse position to assert his Constitutional protection against double jeopardy than a maker. The point has apparently been dropped along with a contention made by the Government in the court below that certain minute differences in the description of the genuine plates with which the counterfeit plate was compared created two distinct offenses. By the dropping of such arguments the Government has clarified the basic issue and for the sake of simplicity the respondent will be referred to in this brief as the manufacturer and not the causer and procurer of manufacture. A summary of the argument and authorities that would have been included in the body of this brief in answer to the abandoned contentions is contained in Appendix to the brief.

[2] The Government concedes that "it is a fair inference from the indictment that the plate passed immediately into the possession of respondent after it was finished and that there was no intervening possession; indeed, in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171 at 174, it is stated that the record in that case 'intimates that respondent compelled an engraver, at the point of a pistol, to make the plate.'" (Government brief, footnote 6, p. 13.)

counts of the indictment and received the maximum sentence that could have been imposed on such indictment, namely, 15 years in a Federal Penitentiary and $5,000.00 fine on each of the two counts, the prison sentences to run consecutively.

In 1941 he filed a petition for a writ of habeas corpus in the District Court for the Northern District of California, in which he contended that his entire sentence was void because at the time of arraignment he was denied benefit of counsel. Apparently, he also made some contention at that time that the sentence on the second count of the indictment was void. Even if such contention had been considered correct respondent would not have been entitled to his liberty at that time because he was still serving the sentence validly imposed under the first count. However, in affirming denial of the petition, the Ninth Circuit Court took occasion in dictum to approve the sentence on the second count and to restate the erroneous rule of its earlier decisions hereafter discussed.

Following his unsuccessful attempt to secure his liberty in the Northern District of California, respondent filed a motion in the convicting court (United States District Court for the District of Minnesota) to have the sentence imposed on count two vacated (R. 3).[3] Respondent's motion was denied, (R. 10) and he appealed to the Circuit Court of Appeals for the Eighth Circuit (R. 11). Respondent submitted a brief, written by himself, to the Circuit Court (R. 15, 16). The case was argued for the Government by an Assistant United States Attorney, and no appearance was made for respondent (R. 16). The Eighth Circuit Court of Appeals reversed the order of the District Court and re-

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[3] See *Holiday* v. *Johnson*, 313 U. S. 342, 349. Rule 35 of the Federal Rules of Criminal Procedure provides that "the court may correct an illegal sentence at any time."

manded the cause with directions to vacate judgment in respect to the second count (R. 23).

The opinion of the Eighth Circuit, 157 F. 2d 616, is lucid and persuasive. The Court concluded that one who manufactures a plate, unlawfully possesses it at the moment of manufacture, and that the intent that it be used in counterfeiting is inferable and, in fact, almost conclusively proved by the fact that the possession arose from an unlawful manufacture. The Court held that possession is a continuing offense, not divisible for purposes of charging separate crimes, and that it is complete at the first instant of possession, which instant coincides with the instant when the crime of manufacture is complete. The Court used the universally recognized evidence test in determining that double jeopardy was involved in the sentence on the second count.

Specification of Errors Urged by the Government

The Government urges that the Circuit Court of Appeals erred:

(1) "In holding that on the facts appearing in the indictment, respondent could not be given consecutive sentences for the offenses of causing to be made a plate adapted for counterfeiting government obligations and of thereafter possessing the plate with the specific intent to use it for counterfeiting such obligations."

> (Such specification of error neglects to state that the crime of possession was alleged to have been committed at the same date and place as the crime of unlawful manufacture (See footnote 2, p. 4).)

(2) "Directing that the sentence on count two be vacated."

Summary of Argument

The sentence under the second count of the indictment is void for the reason that it inflicts a second punishment for an offense included in the first count, in violation of the Fifth Amendment to the Constitution.

I. This Court has established certain well-defined tests for determination of questions involving double punishment. Under these tests, a conviction upon one count of an indictment will bar a conviction and sentence upon another when the evidence required to support a conviction upon one of them would have been sufficient to sustain a conviction upon the other.

II. In order to prove the offense of unlawfully making a plate (count one), the Government is required to present evidence that will sustain a conviction for the possession of that plate with the specified intent.

1. Proof that respondent unlawfully made the plate, at a certain time and place (count one) proves that respondent had possession, custody or control of the same plate at the same time and place (count two).

2. Proof that respondent unlawfully made the plate (count one) is convincing evidence (sufficient to sustain a conviction) of intent to use the plate to counterfeit government obligations (count two).

3. The decision of the court below is not in conflict with *Albrecht* v. *United States*, 273 U. S. 1.

4. The decision of the court below is supported by the weight of authority and is in conflict only with opinions of the Ninth Circuit Court of Appeals.

Argument

I. *Under established and well-defined tests a conviction upon one count of an indictment will bar a conviction and sentence upon another when the evidence required to support a conviction upon one of them would have been sufficient to sustain a conviction upon the other.*

This Court and the Circuit Courts have been most liberal in upholding statutes and the Government's construction of statutes against pleas of double jeopardy. The Government has cited a multitude of cases where steps in crimes have been separately punished [4] and where the same act has been punished twice where it was violative of two statutes,[5] but, except for the erroneous decisions of the Ninth Circuit Court,[6] we have been referred to no case (and we have found none) upholding sentence on an "included offense" where every essential element of such offense has been proved in supporting a conviction on another offense.

The area of protection given by the double jeopardy clause has been severely restricted, but under the facts of this case respondent is still protected, by "the same or different evidence test." [7]

The statement of "the same or different evidence test" in *Morey* v. *Commonwealth*, 108 Mass. 433 has been quoted with approval in many state and federal cases. The following quotation from the case is taken from *Gavieres* v. *United States*, 220 U. S. 340, 342:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon an-

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[4] *Albrecht* v. *United States*, 273 U. S. 1, and companion cases.

[5] *Blockburger* v. *United States*, 284 U. S. 299, and companion cases.

[6] *Matthews* v. *Swope*, 111 F. 2d 697.
Power v. *Squier*, 130 F. 2d 868.
Michener v. *Johnston*, 141 F. 2d 171 (dictum).

[7] *District of Columbia* v. *Buckley*, 128 F. 2d 17 (U. S. C. A. D. C.), cert. den. 317 U. S. 658, and *Blockburger* v. *United States*, *supra*, footnote 5.

other, *unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.* The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied.)

The Constitution forbids Congress or the Courts from twice putting a man in jeopardy for the same offense and this Court has held that the evidence test quoted above determines the question of double jeopardy.[8]

II. *In order to prove the offense of unlawfully making a plate (Count One), the Government is required to present evidence that will sustain a conviction for the possession of that plate with the specified intent.*

The first count of the indictment requires proof that the respondent willingly and knowingly [9] manufactured a plate adapted to the counterfeiting of Government obligations without lawful authority.[9]

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[8] *Blockburger* v. *United States*, 284 U. S. 299. Mr. Justice Rutledge in his concurring opinion in *Buckley* v. *District of Columbia*, 128 F. 2d 17, cert. den. 317 U. S. 658, points out a necessary qualification to the test so that over-refinements in designations of crimes which would technically permit two or more prosecutions for the same offense are to be disregarded by the Courts if the constitutional protection is to have substance.

[9] The Government states that the simple manufacture of a plate would sustain a conviction on count 1. It is true that the statute so reads, but judicial interpretation must supply exceptions or we would reach the absurd conclusion that an honest Government engraver performing the work for which he was paid by the Government could be sent to jail for 15 years or the equally absurd conclusion that a man who made a plate by mistake (admittedly a remote possibility) or under duress, as in the

The respondent's plea of guilty to the charge that he unlawfully manufactured the plate described in the first count of the indictment establishes then:

> **That he made a plate adapted for counterfeiting Government obligations and that he made it willingly, knowingly and without lawful authority.**

To establish the second count the Government would be required to present convincing evidence that respondent had *possession, custody, or control*[10] of the same plate *with intent* to counterfeit Government obligations.

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case of the engraver here (Government brief, footnote 6, p. 13), could be similarly sentenced. The exception in favor of the Government engraver is supported by *United States* v. *Kirby*, 7 Wall (U. S.) 482,

> "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.
>
> "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'That whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

and that in favor of the unwitting manufacturer by *Baender* v. *Barnett*, 255 U. S. 224.

It is therefore apparent that when the Government charged the respondent with "unlawfully" manufacturing a plate, the word unlawfully was not surplusage but a necessary allegation negativing the exceptions that must be read into the statute.

[10] Where the statute denounces acts in the disjunctive, the pleader may charge in the conjunctive (as was done in this case (R. 2)) and proof of any of the acts will support a verdict of guilty. *Crain* v. *United States*, 162 U. S. 625, *Wolpa* v. *United States*, 86 F. 2d 35 (C. C. A. 8), cert. den. 299 U. S. 611.

1. *Proof of manufacture proves possession, custody or control of the article manufactured.*

Respondent believes that the manufacturer of a plate must have possession, custody or control of the plate, and the Government does not now deny that such is the result of manufacture. In its brief in support of its Petition for Certiorari (p. 12) the Government conceded that there is a "possession incident to the manufacture of the plate" and argued that such was not the type of possession denounced in count 2 of the indictment. The untenable point has apparently been dropped.

An equally untenable argument has been substituted, namely, that the continuing offense of possession must have "duration." The argument seems to be that, although respondent possessed the plate at the moment that manufacture was complete, such possession didn't count. The cases of *Hans Nielsen, Petitioner*, 131 U.S. 176, and *In re Snow*, 120 U.S. 274, have rejected similar arguments.

Respondent submits that in order to make a plate the manufacturer must have control over or possession of the raw materials required for manufacture and must be considered to exercise control over the process of manufacture. The control is continuous and he controls or possesses the finished product.

Consequently, at no point, however finely drawn, can it be said: That at this instant the maker had no possession or control, or at this instant the manufacture of a plate is complete but possession has not begun. In the same instant that the crime of manufacture is complete, the crime of possession is complete, and *the evidence that proves manufacture proves possession.*

It has been held repeatedly in cases arising under the National Prohibition Act [11] (which the Government seeks to have disapproved (Government's brief, pps. 24-26)) that,

> "A defendant who is convicted of the manufacture of liquor cannot upon the same evidence also be convicted of possession of the liquor *thereby brought into existence . . .*" (Emphasis supplied.) *Goetz* v. *United States*, 39 F. 2d 903 (C.C.A. 5) 1930.

2. *Proof of unlawful manufacture of a counterfeit plate is convincing evidence (sufficient to sustain a conviction) of intent to use the plate to counterfeit government obligations.*[12]

Thus far, respondent has demonstrated that at the instant he became guilty of the crime of manufacturing a plate, he had possession, custody, or control of the same plate. The intent which respondent had at the instant manufacture was complete, was an intent common to both crimes. Jurymen could properly ask themselves, "Why did the respondent make the counterfeit plate?", and properly decide that he made it to counterfeit government obligations.

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[11] *Morgan* v. *United States*, 294 Fed. 82 (C. C. A. 4).
Tritico v. *United States*, 4 F. 2d 664 (C. C. A. 5).
Patrilo v. *United States*, 7 F. 2d 804 (C. C. A. 8).
Goetz v. *United States*, 39 F. 2d 903 (C. C. A. 5) (decided *after* the Albrecht case. See Government's brief, p. 26).

[12] The Government states in its brief (P. 27) that it does not consider the additional element of intent required to be proved by the fourth clause of Section 150 of the Criminal Code (18 U. S. C. 264) a "controlling difference" between this case and the liquor cases (see footnote 21, p. 28) where intent was not an element of the offense of possession. Respondent will gladly accept such concession but believes that there must be some evidence of intent, which however, is properly supplied by inference. *Bozza* v. *United States*, 91 L. Ed. 579; see also *United States* v. *Reginelli*, 133 F. 2d 595, 598 (C. C. A. 3), cert. den. 318 U. S. 783.

> "That the intent, motive, or purpose necessary for the establishment of a crime may rest in inference hardly requires citation of authority."

Respondent adopts the analysis of the court below (R. 21) as a full and accurate statement of the law.

> "We must therefore consider whether the conceded facts involved in the offense charged in Count one were sufficient to show that appellant's possession was with intent to use the plate for counterfeiting. Intent is a mental condition, invisible to human eyes, and is rarely susceptible of direct proof. The criminal does not ordinarily proclaim or announce in advance his intention to commit a crime. Intent, like any other fact, may be proved by circumstantial evidence (*Majestic Securities Corp.* v. *Commissioner*, 8 Cir., 120 F. 2d 12; *State* v. *Gardner*, Mont. 249 P. 574; 20 Am. Juris. Sec. 340), and ordinarily must be implied from the proven facts and circumstances, including the actions of the person whose intent is in question. It is inferable whenever the means used are such as would ordinarily result in the commission of the forbidden act. This is too elementary to warrant the citation of authorities. Proof of the possession of this plate by one had who unlawfully produced it, in connection with the character of the plate, was, unexplained, not only prima facie proof of criminal intent, but convincing evidence of it. As has been observed, the act of making this plate was an unlawful act, and it came into possession of the appellant by reason of this unlawful act. Evidence of the unlawful making and the resulting possession was competent proof going to the question of intent. The possession resulted from the committing of the crime described in the first count. The plate on its face disclosed its purpose, and the facts were ample to sustain proof of the allegation that appellant's possession was for the purpose of counterfeiting. It is scarcely conceivable that any other or additional facts could have been adduced in support of that allegation."

In *Bozza* v. *United States*, 91 L. Ed. 579,[13] Mr. Justice Black, speaking for the Court held that evidence which es-

[13] Decided February 17, 1947, Case No. 190 of this term.

tablished that the petitioner had aided and abetted the clandestine manufacture of liquor was sufficient to support the inference drawn therefrom by the jury that he had carried on "the business of a distiller . . . with intent willfully to defraud the . . . United States of the tax on . . . spirits so distilled". He used the following apt and colorful language to support his opinion:

> "Men in the jury box, like men in the street, can conclude that a person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: 'The Revenuers are coming!' "[14]

In the light of this Court's conclusion that an intent to defraud the government of liquor taxes may be proved by a showing that petitioner had abetted the carrying on of an illicit distillery, respondent feels confident in urging that unlawful manufacture of a plate establishes an intent to use the plate for counterfeiting.

The point that, to establish a violation of count one, the Government was *required* to prove that respondent made the counterfeit plate willingly, knowingly and without lawful authority has been covered previously.[15] It is respondent's contention that such proof of unlawful manufacture *requires* proof of facts which establish, as the only credible

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[14] The dissenting opinion in the *Bozza* case emphasizes that the only evidence adduced to show that petitioner had the required intent showed that he aided and abetted in the illicit manufacture of liquor and states:

> ". . . evidence is necessary which shows that by some act of concealment he promoted the fraud, or by counsel and advice furthered the unlawful scheme, or in fact had some interest in the project."

Respondent's plea of guilty to the first count establishes that he was a principal in the unlawful manufacture of a counterfeit plate. There could hardly be more convincing evidence that he "furthered the unlawful scheme or . . . had an interest in the project."

[15] See footnote 9 page 9.

inference, respondent's intent to use the plate to counterfeit government obligations.[16]

3. *The decision of the court below is not in conflict with Albrecht v. United States, 273 U. S. 1.*

The government relies principally on the *Albrecht* case for reversal. In that case, this Court held that there was no double jeopardy in punishment for possession of illegal liquor and for its subsequent sale. The relevant portion of the opinion follows:[17]

> "possessing and selling are distinct offenses. *One may obviously possess without selling;* and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and *later* sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. *The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act;* but the general principle is well established" (Italics supplied).

The government argues that the "liquor" cases which held that a man could not be sentenced for possessing liquor after being sentenced for manufacturing the same liquor, were decided before the *Albrecht* case and that the rule of law stated in the *Albrecht* case, if applied to such

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[16] The case thus falls within the most literal and technical application of the test announced in *Blockburger* v. *United States*, 284 U. S. 299, 303, 304:

> "The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

[17] 273 U. S. 1, 11.

cases, would have resulted in a holding of no double jeopardy. In the light of Mr. Justice Brandeis' well-established reputation for thoroughness in research, it appears much more likely that he read *Reynolds* v. *United States*, 280 F. 1 (C. C. A. 6), *Morgan* v *United States*, 294 F. 82 (C. C. A. 4), *Tritico* v. *United States*, 4 F. 2d 664 (C. C. A. 5) and *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8), concluded that the "precise question" involved in the *Albrecht* case had not been "discussed in . . . a lower Federal court in connection with the National Prohibition Act". Respondent believes that if he had disapproved of such cases he would have said so.

It should also be noted that *Goetz* v. *United States*, 39 F. 2d 903 (C. C. A. 5), another of the "liquor cases", was decided in 1930 after the *Albrecht* decision.

The statement in the *Albrecht* opinion "one may obviously possess without selling" illustrates the fundamental difference between the facts in the *Albrecht* case and the facts in the case at bar, and indicates why Mr. Justice Brandeis did not consider the "liquor cases" applicable. One may obviously possess illegal liquor and be guilty of that offense, although he intends to drink it or give it away. If he changes his mind, and later sells the liquor, he has committed another offense provable by different evidence. Albrecht committed one offense of possessing liquor—an offense complete and punishable at the instant of possession —and subsequently another offense, that of selling the liquor.

Respondent, on the other hand, did not merely make a plate and afterward control or possess it. He controlled or possessed it *while* and *as* it was being made, and the crime of manufacture could not be complete until he possessed it. Briefly: in the *Albrecht* case, one crime was committed; subsequently, another. In the case at bar, *no* crime was committed until the instant when *both* were committed by

the same act. Until respondent had possession of the plate, there *was* no plate for the manufacture of which he could be punished.

The *Albrecht* case holds in effect that one may possess liquor for an instant before sale, and thereby be guilty of the crime of possession. The holding is entirely consistent with respondent's theory that at the instant when manufacture and possession coincided, the first instant of possession, the crime of possession was complete.

What has been said of the *Albrecht* case is equally applicable to the other possession and sale cases cited by the government.[18]

They are no more in conflict with the decision of the court below than is the *Albrecht* case. In all, consecutive sentences were sustained for the possession and selling, or for the possession and passing of counterfeit or altered money. They are clearly distinguishable from the instant case, for in each of them, as in the *Albrecht* case, the offense of possession was necessarily accomplished and complete *before* any sale or passing was attempted, and *need not have resulted in any such sale or passing.*

4. *The decision of the court below is supported by the weight of authority and is in conflict only with opinions of the Ninth Circuit Court of Appeals.*

There is a clear conflict in decisions of the Circuits which will be resolved by the Court's decision in this case.

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[18] *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note. See also *Ross* v. *Hudspeth*, 108 F. 2d 628 (C. C. A. 10); *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; and *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549, which involved separate sentences for possessing counterfeit coins and passing them.

The opinion below which the Government asks the Court to reverse is directly supported by decisions of the Fourth Circuit [19] and the Fifth Circuit,[20] and it is further supported by similar opinions involving closely related fact situations by the Second Circuit,[21] the Sixth Circuit,[22] and by two other opinions of the Eighth Circuit.[23]

The government has not cited a case and we have found none (other than from the Ninth Circuit) in conflict with the opinion below.

Respondent submits that the Ninth Circuit has erroneously interpreted the established test of double jeopardy. The error was made in *Matthews* v. *Swope*, 111 F. 2d 697 (C. C. A. 9) and the decision in *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9) and the *dictum* in *Michener* v. *Johnston*, 141 F. 2d 171 (C. C. A. 9) rest squarely on its authority.[24] Matthews was convicted and punished for (1) manufacture and (2) possession of the same plate. The court, without any mention of intent and while correctly citing the rule that "there is no double jeopardy . . . if *each* offense requires proof of a fact which the other does not", (italics supplied) arrived at the obvious *non sequitur* that Matthews was properly sentenced on both counts "since the proof necessary to support the first count is *different from and additional to* that required to support the second count" (Italics supplied).

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[19] *Morgan* v. *United States*, 294 Fed. 82.

[20] *Tritico* v. *United States*, 4 F. 2d 664 and *Goetz* v. *United States*, 39 F. 2d 903.

[21] *Schroeder* v. *United States*, 7 F. 2d 60. (Transportation and possession.)

[22] *Reynolds* v. *United States*, 280 Fed. 1. (Manufacture of liquor and possession of manufacturing equipment.)

[23] *Patrilo* v. *United States*, 7 F. 2d 804. (Manufacture of liquor and possession of manufacturing equipment.)

Cain v. *United States*, 19 F. 2d. 472. (Sale of narcotics by mail.)

[24] Both Matthews and Equier represented themselves, and the Ninth Circuit did not have the benefit of briefs by counsel in either case.

The language is plain and the meaning unmistakable. In the phrase *additional to* is a clear admission that proof of the second count was inherent in proof of the first, and that in only one count, the first, was there a new and different element requiring "additional" proof. Such a test could not be used in any case involving "included offenses", for proof of a greater offense must always be different from and additional to the proof required to support the lesser.

Answer to Government Argument

The Government contends that: (1) to combat the evils of counterfeiting, Congress defined seven separate offenses which might be incidents of counterfeiting activities; the clauses defining the offenses are made generally applicable to "whoever" engages in the prescribed activity; since no exceptions are stated in the statute, it must have been the intent of Congress that anyone guilty of any one or more of the offenses should be punished for each. "There is not a word to indicate that violation of one clause absolves an offender from criminal liability for violation of another",[25] and (2) constitutional considerations do not preclude separate punishments for the two offenses.

The answer to such arguments is that Congress, in creating a general statute aimed at counterfeiting activities, must perforce speak in general terms, relying on the courts to construe the statute as particular cases arise. Every statute operates within the framework of the Constitution, and the fact that Congress has not, within the clauses of the statute, excluded those cases wherein double punishment for one offense is involved, is no indication that the statute was intended to operate without such qualification. In *Hans Nielsen, Petitioner,* 131 U. S. 176, for illustration,

[25] Government brief, p. 16.

the offenses of unlawful cohabitation and of adultery were denounced not merely by different clauses but by different statutes,[26] carrying different penalties, and "there is not a word to indicate that violation of one (statute) absolves an offender from criminal responsibility for violation of another"; but this Court held that the evidence necessary to support a conviction for unlawful cohabitation would also support a conviction for adultery, and that separate sentences could not be imposed. The conclusion, it is fair to point out, was arrived at by the application of established tests of double jeopardy and not "intuitively" or upon the "distinct evil" theory.

The fact that Congress has made the statute generally applicable to "whoever" does any of the proscribed acts, does not mean that the statute was designed to be applied literally and without regard to common sense or constitutional rights. For example, the word "whoever" in the clause referring to making plates must be construed to exclude government engravers, employed to make plates. Likewise, it is our contention, that the word "whoever" used in referring to those who may be criminally liable for possessing a plate with the prescribed intent, should be construed so as to preserve the constitutional right of freedom from double punishment. The problem, then is to decide whether this is a case in which double punishment is involved.

As the government has admitted, this case must be decided on the basis of the "composite factual picture presented by both counts of the indictment",[27] and not on a hypothetical state of facts. The bulk of the government's argument on the question of the import of statute, however, ignores this proposition. The government states that,

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[26] Sections 314 and 316 of the Criminal Code (18 U. S. C. 514, 516).

[27] Government brief, footnote 6, p. 13.

"In the fourth clause it (Congress) was dealing with an offense which *succeeds* the manufacture of a plate, an offense which comes into being when the manufacture *ends*, and which might, and probably would, have duration."[28] Two fallacies are involved in the statement, as related to this case. First, the offense of possession in this case did not *succeed* the manufacture of the plate. The indictment charges that "on or about August 25, 1934" the respondent unlawfully made the plate and that "on or about August 25, 1934, and thereafter" he possessed the plate (R. 1). This is to allege that the crime of possession was consummated when he *first* possessed the plate on that date, and not at some particular, arbitrarily chosen, hour or minute after that instant. And he first possessed the plate at the same instant the act of making it became a crime. Secondly, while the offense of possession *might* have duration, it is not an essential element of the offense. Unlawful possession like unlawful cohabitation[29] is an offense not augmented by the fact that it may continue for more than a day, and not subject to arbitrary division into periods of time creating separate offenses.

The government contends that because respondent pleaded guilty to possession of a plate on or about August 25, 1934, "and thereafter", the possession count in this case was based upon a duration of possession not reflected in the liquor cases.[30] The phrase "and thereafter" is not necessary under the statute, adds nothing whatever to the charge contained in count two, and constitutes surplusage. The Government concedes that it "would (not) regard the differences as controlling".[31] But in suggesting such a

[28] Government brief, page 17.

[29] *In re Snow*, 120 U. S. 274.

[30] Government brief, p. 27.

[31] Government brief, p. 27.

construction of the statute, and infliction of separate punishments in this case the Government seems not to recognize its particular argument for what it is—precisely the same theory of punishment it unsuccessfully advocated in *Hans Nielsen, Petitioner*, 131 U. S. 176. In the *Nielsen* case, the Government sought to (1) ignore the element of adultery established by proof of unlawful cohabitation under the first indictment; and then to (2) arbitrarily terminate that continuing offense of unlawful cohabitation as of May 13, 1888, in order that (3) adultery could be charged as a separate offense occurring thereafter, on May 14, 1888.

If there is any difference between the two cases it is only that in the *Nielsen* case the Government charged an end to a continuing offense while it was still in progress while in respondent's case it seeks to fix the *beginning* of a continuing offense at a time (after manufacture) when the evidence already shows the offense to be legally complete and punishable.

"It is to prevent such an application of penal laws," said this Court in *In re Snow*, 120 U. S. 274, 282, 285, "that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted . . . there was but one entire offense . . . between the earliest day laid in any indictment and the latest day laid in any."

If "earliest day" is logically interpreted as "earliest moment", then the Court's rulings in the above cases are precisely in point with the respondent's contentions that (1) the offense of possession was proved when it was *first* proved under the charge of manufacture in count one, and (2) this *first* proof of, and conviction for, possession operated as a conviction for the whole period up to the finding of the indictment, and protected respondent from a

second prosecution and punishment for that offense for any part of the whole period.

Finally, if Congress had contemplated or intended a possession having *duration* as the substance of the offense, it could easily have so provided in the statute, as was done in describing the offense of "Uttering Forged Obligations".[32] In that section of the Criminal Code, the wording "keep in possession" was used. It may also be pointed out on a policy level, that it would be unwise to import into the crime of possession any requirement of "duration". Not only would such concept make for uncertainty in definition of the crime, but proving possession for a period of time might be difficult and sometimes impossible.

Throughout its brief, the Government argues that the intent of Congress "to strike at distinct evils" should decide all questions of double jeopardy. Now, Congress "strikes at distinct evils" only by denouncing them in separate statutes, separate clauses, or disjunctively; and presumably it intends to strike at *all* evils so denounced. What the Government is really advocating therefore, is the practical abandonment of all rules and tests of double jeopardy. By the reasoning which the Government uses in its brief, it might be argued that one must assault a mail clerk with the intent to rob him before one can commit the robbery itself, and also that robbery is but a "step" toward the carrying away of the proceeds of the robbery and that one might be separately punished for each of the three "steps" in a single robbery. Yet it is held that robbery is not complete without asporation, *Rutkowski* v. *United States*, 149 F. 2d 481 (C. C. A. 6), and the offense of assault with intent to commit robbery is included in the offense of robbery, *Costner* v. *U. S.*, 139 F. 2d 429 (C. C. A. 4).

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[32] Sec. 151 of the Criminal Code (18 U. S. C. 265).

To summarize: the Government's theory, is that Congress intended cumulative punishments under a statute or statutes aimed at "different evils". The theory cannot apply to cases involving double jeopardy. *Hans Nielsen, Petitioner,* 131 U. S. 176, *Cain* v. *United States,* 19 F. 2d. 472 (C. C. A. 8),[33] *Costner* v. *United States,* 139 F. 2d. 429 (C. C. A. 4).

Respondent submits that Congress did not intend that one in his position should be given a sentence of 30 years.[34]

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[33] The *Cain* case presents a factual situation substantially similar to this case, although theoretically it is not as strong. There the defendant was indicted (1) for unlawfully selling narcotics and (2) for sending narcotics through the mail. At the trial the Government proved that delivery, completing the sale charged in the first count, was accomplished by mail and such mailing constituted the offense charged in the second count. The court held that the two offenses were proved by the evidence required to prove the first count. The court pointed out that the "sale" was not complete until delivery and that at the instant that the narcotics were deposited in the mail both offenses were complete and were proved by the same evidence.

The authority of the *Cain* case was questioned in dictum in *King* v. *United States,* 31 F. (2d) 17 (C. C. A. 9), which case was affirmed in a *per curiam* opinion of this court, 280 U. S. 521, on the authority of the *Albrecht* case. The decision in the *King* case is entirely consistent with established tests, with respondent's theory of double jeopardy *and* with the *Cain* case. There the defendant was indicted for selling narcotics not in or from the original stamped package, he pleaded guilty and was later indicted for sending narcotics in interstate commerce *without having registered and paid a special tax.* The evidence showed that the first indictment required proof of shipment in interstate commerce to establish delivery, but proof to sustain such indictment did not require evidence, and none could have been properly introduced, proving that defendant was not licensed and had not paid the special tax, which are elements of the crime charged in the second indictment which *must* be proved to warrant a conviction. Similarly, evidence showing that the narcotics were not *sold in or from the original stamped package* would not be material or relevant to prove the offense charged in the second indictment. The *King* case points out not a weakness in the *Cain* case but in the theory of double jeopardy held by the Ninth Circuit Court of Appeals.

[34] *Costner* v. *United States,* 139 F. 2d 429, 431 (C. C. A. 4).

> "the idea that . . . Congress intended to authorize two punishments for the same unlawful conduct, that is, ten years for the assault with intent to rob, and ten years for robbery, is too unreasonable to be seriously entertained."

Respondent manufactured a plate for counterfeiting, an offense for which Congress fixed a maximum penalty of 15 years imprisonment. He was sentenced to 15 years for manufacture, plus 15 years for possession of the same plate, a necessary incident of manufacture.

Under the theory of punishment thus exemplified:

Every person who violates Clause Two of Section 150 of the Criminal Code (18 U. S. C., 264) by the manufacture of a plate, automatically and inescapably becomes subject also to sentence for a violation of Clause Four of that section, for possessing the plate with the intent that it shall be used in counterfeiting.

It is a fair question to ask, then: Is it following the intent of Congress to subject *every* maker of a plate to a 30 year sentence, when the statute states that the maximum sentence for a maker shall be 15 years?

To pose the question, is to suggest the answer and the explanation. While the Government argues [35] that it was the intent of Congress to punish the possessor of a plate even if he *had* made it, a more credible explanation would seem to be that what Congress really intended was to punish the possessor of a plate even if he had *not* made it—just as a legislature might intend to punish the receiver of stolen property, even though he had not stolen it. In revising and broadening the counterfeiting statutes, Congress meant simply to reach a class of offenders who had theretofore been immune— the possessors of counterfeiting implements. Having made it an offense to manufacture a plate, Congress saw that counterfeiters might often be apprehended while using, or in possession of, plates long after such manufacture. They should be punished in such circumstances although it might be impossible to prove who made the plates or caused them to be made.

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[35] Government brief, p. 18.

Conclusion

The decision of the Court in this case will clarify the meaning of the constitutional guarantee against double jeopardy, and respondent respectfully submits that the Court should not depart from established tests to accept the confusing concept of "different evils" and weaken protection of an individual under the Constitution.

Respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed.

APPENDIX

Point I

Respondent Who Caused and Procured a (Counterfeit) Plate To Be Made Is Guilty In the Same Manner and to the Same Extent As One Who Personally Makes a Plate; He Has the Same Possession, Custody and Control of the Plate As the Actual Maker.

By dichotomy, the person who actually made the plate at the respondent's behest made it either willingly or unwillingly. If he made it willingly he was an accomplice or principal and both parties were liable for violations of law incident to the undertaking. Whatever possession the actual maker had, was also the possession of respondent. A case precisely in point is *Minnella et al.* v. *United States,* 44 F. 2d 48 (C. C. A. 8), where the court held:

> "As to Rosario, the evidence is also clear. . . . He paid Mays for his services in making the plates. . . . He was an active participant in the entire matter, and the acts of physical possession of Mays and Fidele were the possession of all who were in this common undertaking."

And in *Pinkerton* v. *United States,* 328 U. S. 640, it is said:

> "So long as partnership in crime continues, the partners act for each other in carrying it forward."

It is not necessary, in order to hold the procurer or abettor liable as a principal to prove a conspiracy. In *Morgan* v. *United States,* 149 F. 2d 185, 187 (C. C. A. 5) cert. den. 326 U. S. 731, the court held that:

> "While the evidence introduced in the trial would have been competent to prove conspiracy, we think, as did the court below, that it was also competent to establish that Johnson and Warner were merely employees or agents of appellant or of corporation controlled by him, and that their acts were for and in his behalf. It

> is a *well recognized principle that the act of an agent with the knowledge and consent of the principal is the act of the principal.*"

Thus, if the actual maker was a *willing* worker, the respondent is liable for his acts as a partner in the undertaking. *United States* v. *Gooding*, 12 Wheat. (U. S. 459).

If on the other hand, the actual maker of the plate made it *unwillingly*, under force and compulsion, then both he and the plate were under the immediate control and dominion of respondent. If the maker acted unwillingly and under compulsion he had no legal discretion and his acts were the acts of respondent who became a principal in the first degree. See *United States* v. *Gooding*, 12 Wheat. (U. S.) 459, 468.

Whatever possession such an unwilling maker had, was the possession of respondent. This proposition is amply sustained by *United States* v. *DeNormand, et al.*, 149 F. 2d 622 (C. C. A. 2), a case which this court has considered well.[1]

Appellants held up the drivers of two trucks as the drivers left a lunch room, locked them in the truck terminal and were arrested as they left the terminal. The trucks were parked on a nearby street and appellants never touched either the trucks or their contents.

> "By that act", said the court, "they deprived the carrier of power to exercise control or dominion over the truck, and acquired such power for themselves; thus *whatever possession the carrier or its employee had was transferred to them.* If they did not take actual physical possession they at least took constructive possession."

This case is also a conclusive rejection of the theory that possession must be *actual*. Appellants were convicted solely on proof of constructive possession.

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[1] Forma pauperis granted, certiorari denied 326 U. S. 756; petition for rehearing denied 326 U. S. 808; motion for leave to file second petition for rehearing granted, rehearing denied 326 U. S. 811; motion for leave to file third petition for rehearing denied 327 U. S. 816.

The foregoing arguments demonstrate that one cannot cause the manufacture of a plate by either (1) a willing or (2) an unwilling agent without being guilty in the same manner as the agent and without having the same control, custody or possession of the plate as the actual maker.

But there is a second and more direct method of establishing the point. Under Section 332 of the Criminal Code (18 U. S. C. 550) "Principals" defined:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is* a principal" (Italic supplied).

It is established that, by virtue of this statute, an indictment charging one with aiding or procuring the commission of a crime, *charges him as a principal. Ruthenberg* v. *United States*, 245 U. S. 480; *Rooney* v. *United States*, 203 Fed. 928 (C. C. A. 9); *Davis* v. *United States*, 12 F. 2d 253 (C. C. A. 5), cert. den. 271 U. S. 688. And there are also innumerable cases holding that an indictment charging one as a principal will be supported by evidence that he is only an aider, abettor, or procurer of the crime. *Colbeck* v. *United States*, 10 F. 2d 401 (C. C. A. 7), cert. den. 271 U. S. 662. *Jin Fuey Moy* v. *United States*, 254 U. S. 189. *DiPreta* v. *United States*, 270 Fed. 73 (C. C. A. 2). *Vane* v. *United States*, 254 Fed. 32 (C. C. A. 9).

The statute was designed to abolish the distinctions between accessories and principals in crime and, in so far as criminal liability is concerned, to equate the two offenders. Its purpose has been achieved. By virtue of the statute, one who is convicted of causing and procuring the making of a plate is guilty as a maker, and subject to punishment in the same manner. Whatever possession or control of the plate the maker has and whatever criminal liability he may be subjected to . . . the same is shared by the procurer or abettor.

The application of this statute to cases where double jeopardy is involved, is shown in *Manning* v. *United States*, 275 Fed. 29 (C. C. A. 8), where it was held that defendant

who had been acquitted under an indictment charging conspiracy to sell opium, could not be convicted under a second indictment charging a conspiracy to issue prescriptions for opium which his co-conspirator would fill, for, by virtue of the "'Principals' defined" statute, proof of the facts alleged in the second indictment would have been sufficient to sustain a conviction under the first indictment.

The *Manning* case is cited here to show that if a maker could not be prosecuted on the second count of the indictment, respondent as a procurer and causer of making would have the same immunity. The reason for the rule is clear: if a principal is given constitutional protection from double punishment, a participant, who is certainly no *more* guilty than the principal, should have the same protection.

The extent to which this statute is applicable in making an aider or procurer of a crime liable for all the incidents of the crime, is indicated in the recent case of *Rappy* v. *United States*, 157 F. 2d 964 (C. C. A. 2) cert. den. 91 L. Ed. 377. Judge Learned Hand held in effect that Rappy, in aiding and abetting Essig, became automatically guilty of *possessing* stolen property (actually in the possession of Essig) to the same extent as Essig, simply because under the "Principals' defined" statute, he *could* have been indicted and convicted as a principal.

The theoretical soundness of the argument is thus established. There remains the question of whether there are any circumstances in this case which would render the argument inapplicable. Respondent's crime resulted from his forcing an engraver at the point of a gun to make the counterfeit plate.[2] The Ninth Circuit in *Michener* v. *Johnson*, 141 F. 2d 171, implies in a dictum that under such circumstances, respondent need not have had control, custody, or possession of the plate. Their remarks seem completely discredited by the holding in the *DeNormand* case. It is hard to conceive of a situation where a procurer could

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[2] *Michener* v. *Johnson*, 141 F. 2d 171. Respondent's application for a writ of habeas corpus was denied. This court can take judicial notice of such habeas corpus proceedings. *Wells* v. *United States*, 318 U. S. 257. The circumstances of manufacture are mentioned twice in the Government brief, footnotes 6 and 24, pps. 13 and 32.

be more guilty as a principal in the crime of making a plate, than one wherein he used a pistol to insure that his will would be done. If ever a man had control, custody and possession of a plate, in every stage of its manufacture and upon its completion, it was certainly respondent.

One final point may be noted. In count two of the indictment, respondent was charged with possession, custody and control. Since possession, custody and control are denounced disjunctively in the statute, it is necessary to prove only *one* of these in order to convict on count two. *Wolpa* v. *United States*, 86 F. 2d 35 (C. C. A. 8) cert. den. 299 U. S. 611; *Crain* v. *United States*, 162 U. S. 625. Irrespective of whether respondent had possession of the plate while the engraver was being forced to make it, he unquestionably had *control.*

Point II

Proof Under Count One That a Counterfeit Plate Was "in the Likeness' of a Plate Designated for the Printing of "That Certain Ten-Dollar Federal Reserve Note (Serial Number, Series, and Check Letter Stated), Would Also Prove the Same Counterfeit Plate To Be "In the Similtude" of a Plate from Which Genuine Notes (of the Same Denomination, Series, Serial Number, and Check Letter) Have Been Printed (Count Two).

From the record it is clear that only *one* plate was involved in respondent's crime (R. 1; opinion of court below, R. 17). Proof that this plate was "in the likeness" of a plate designated for printing bills of a particular description, would certainly be adequate to prove that the *same* counterfeit plate was "in the similitude" of a plate from which *bills of the identical description* have been printed. Likeness and similitude are words of general description, and proof of similitude is sufficient if it is such as would deceive an ordinary, unsuspecting man. *Minella et al.* v. *United States*, 44 F. 2d 48 (C. C. A. 8).

Also, it may be noted: It is a matter of common knowledge that the currency of the United States conforms to an easily-recognized pattern that does not, and for obvious

reasons cannot suddenly change to the extent that some new series of ten-dollar Federal Reserve notes will no longer be recognizable as resembling the old. Such resemblance comes within the definition of similitude under this statute. *United States* v. *Raynor*, 302 U. S. 540; *Minnella et al.* v. *United States*, 44 F. 2d 48 (C. C. A. 8). It may be presumed, therefore, that any plate which has been *designated* for the printing of a certain class of notes is in substantial similarity to some plate which has been used for printing notes of the same description.

Finally, it would seem that this technical variance in the method of describing the genuine plates to which respondent's plate is likened, is not substantial enough to warrant an additional 15 year punishment on the ground that the two offenses are different. As Mr. Justice Rutledge states in his concurring opinion in *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21 (U. S. C. A. D. C.):

> "The court must evaluate as well as spell out the difference, and determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify a refusal to apply the constitutional protection."